IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CHRIS N. ACTON, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 03-4159-CV-NKL
	)	
CITY OF COLUMBIA, MISSOURI	)	
	)	
	)	
Defendant.	)	

ORDER

Pending before the Court is the Plaintiffs Motion for Partial Summary Judgment [Doc. # 25]. In their Motion, Plaintiffs seek judgment against Defendant City of Columbia, Missouri ("Columbia"), on the issue of liability only. For the reasons stated below, the Court grants in part and denies in part Plaintiffs' Motion.

I. Factual Background[1]

Plaintiffs are ninety-three current and former firefighters for Columbia. They allege that Columbia violated the Fair Labor Standards Act, 29 U.S.C. §§ 207 *et seq.* ("FLSA"), when it failed to include the firefighters' longevity pay, sick leave buy back pay, step-up pay, standby pay, and meal allowances in Plaintiffs' regular wage rate. As a result, Plaintiffs claim that they have not received the correct overtime compensation mandated by the FLSA.

[1]There is no dispute about the facts in this case.

Additionally, Plaintiffs allege Columbia violated the FLSA when it required firefighters to work 204.42 hours during a 27-day work period before they became eligible for overtime compensation. Plaintiffs aver the threshold number of hours for a 27-day work period should be 204 hours instead of 204.42 hours.

A. Columbia's Compensation Programs

Plaintiffs' Complaint lists five compensation programs which Columbia makes available to its firefighters--longevity pay, sick leave buy back pay, step-up pay, meal allowances, and standby pay. Based on the parties' briefs, the longevity pay, step-up pay, and standby pay programs are no longer in dispute because Columbia concedes it incorrectly administered these programs under the FLSA.[2] Therefore, the Court will only address the sick leave buy back pay program and the meal allowance program.

Under Columbia's sick leave buy back program, firefighters who work 24-hour shifts accumulate ten days of sick leave every year. Firefighters who have accumulated at least six months' worth of sick leave may "sell" their unused sick leave time to Columbia in exchange for a lump sum payment. After a firefighter submits a written request, Columbia purchases the firefighter's unused leave time and pays the firefighter seventy-five percent (75%) of the firefighter's regular hourly wage for each hour Columbia buys back from the firefighter. Plaintiffs allege Columbia should include the compensation it pays them for their unused sick time in their regular wage rate for purposes of calculating their overtime

[2]The Court has also been informed that all disputes concerning these programs have been settled.

compensation.

The other benefit program at issue is the per diem meal allowance Columbia provides to its firefighters. At the beginning of each six-month period, Columbia provides a meal allowance advance to each of its firefighters based on the anticipated number of 24-hour shifts the firefighter will work during the upcoming six month period. The advance works out to $12 per 24-hour shift. Firefighters do not need to submit receipts or keep track of their spending in order to receive the advance. However, if a firefighter does not work one of the anticipated 24-hour shifts, then the firefighter must repay to Columbia the corresponding meal allowance for that shift. In their Complaint, Plaintiffs allege Columbia should include the $12 per 24-hour shift meal allowance in their regular wage rate for purposes of calculating their overtime compensation.

B. Hours Ratio

In addition to challenging Columbia's sick leave buy back and meal allowance programs, Plaintiffs also contend that Columbia used the incorrect hours ratio in calculating the threshold number of hours for when firefighters became eligible for overtime compensation under the FLSA. Prior to the filing of this lawsuit, Columbia paid firefighters overtime compensation only after they worked in excess of 204.42 hours during a 27-day work period. Columbia changed its policy during these proceedings and now uses 204 hours during a 27-day work period as the threshold for determining a firefighter's eligibility for overtime compensation. Plaintiffs agree that 204 hours is the correct number.

There being no dispute regarding the material facts in this matter, the Court grants in part and denies in part Plaintiffs' Motion for Summary Judgment.

II. Discussion

The primary question before the Court is whether the FLSA requires Columbia to include in a firefighter's regular hourly rate of pay all payments made pursuant to the sick leave buy back program and the meal allowance program.

A. FLSA Requirements

The FLSA requires employers to pay their covered employees one and one-half times their regular hourly rate for each hour the employees work in excess of forty hours per workweek. 29 U.S.C. § 207(a)(1).

The FLSA provides the regular rate of pay shall include "all remuneration for employment paid to, or on behalf of, the employee . . . ." 29 U.S.C. § 207(e). The statute excludes certain types of compensation from the regular rate of pay, including:

> **(1)** sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
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> **(2)** payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment.
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> **(3)** Sums paid in recognition of services performed during a given period if . . . (a) both the fact that payment is to be made and the amount of the payment

> are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly . . . .

29 U.S.C. § 207(e)(1)(2)(3).

B. Sick Leave Buy Back

Columbia's sick leave buy back program pays firefighters a lump sum in return for their unused sick leave. Plaintiffs characterize the buy back program as a non-discretionary attendance bonus. According to the FLSA, a bonus is included in an employee's rate of pay so long as it is nondiscretionary. This is because the FLSA says all remuneration for employment should be included and then exempts only discretionary bonuses. By implication, nondiscretionary bonuses are included in the definition of regular rate of pay. *See Landaas v. Canister Co.*, 188 F.2d 768, 771 (3rd Cir. 1951) (holding that attendance bonus was part of regular rate of pay); *Bibb Mfg. Co. v. Walling*, 164 F.2d 179 (5th Cir. 1947) (attendance incentive must be included in regular rate of pay). *See also*, 29 C.F.R. § 778.211 (attendance bonus is included in rate of pay). Therefore, if the sick leave buy back program is a nondiscretionary bonus and if it is remuneration for Plaintiffs' employment, it should be included in the Columbia firefighters' regular rate of pay.

Unquestionably, the buy back program is nondiscretionary. Columbia administers the buy back program pursuant to a Columbia Ordinance. Columbia, Mo., Code ch. 19, art. V, § 19-130(q)(2) (1964). The Ordinance states: "The City . . . *shall* buy back up to one hundred (100) per cent of the total unused sick/emergency leave accumulated by the employee . . . ." *Id.* (emphasis added). Traditionally, the use of the word "shall" is a

directory phrase that mandates action. *See Dubois v. Thomas*, 820 F.2d 943, 948 (8th Cir. 1987) (noting the general mandatory nature of the word "shall" in legislative construction) (citations omitted); *United States v. Meyers*, 106 F.3d 936, 941 (10th Cir. 1997) (same); *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (noting the use of the word "shall" indicates a command that does not allow discretion on the part of the individual who is instructed to act).

Moreover, the amount of the payment is also nondiscretionary under the Ordinance. The Ordinance specifies "For each hour of sick leave bought back by [Columbia], the employee *shall* receive seventy-five (75) per cent of his hourly rate of pay in effect at the time that the sick leave buy back check is written . . . ." Columbia, Mo., Code ch. 19, art. V, § 19-130(q)(2) (emphasis added). Again, the Ordinance uses the word "shall" and specifies the amount of remuneration Columbia will pay to employees who exercise their rights under the buy back provision.

Although the buy back program is clearly nondiscretionary, the more difficult question is whether the buy back program is a bonus. Plaintiffs' conclusion that it is an attendance bonus is supported by a Department of Labor ("DOL") opinion letter. Letter from Herbert J. Cohen, Deputy Administrator, U.S. Department of Labor (Feb. 24, 1986) (Ex. A to Plaintiffs' Motion). The DOL letter discusses a leave buy back program that is almost identical to Columbia's sick leave buy back plan. The program outlined in the letter permits employees to either sell back their unused sick leave time or, in the alternative, receive a bonus day of leave. According to the DOL, if the employee opts for payment in

exchange for sick leave, the compensation must be included in their regular wage rate for the purpose of calculating overtime compensation under the FLSA. This is because the DOL analogizes the buy back program in the letter to a nondiscretionary attendance bonus that, under the FLSA, must be included in an employee's regular wage rate.

> As indicated in IB 778.211(c), bonuses which are announced to employees to induce them to work steadily or more rapidly or more efficiently, or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, or bonuses contingent upon the employee's continuing in employment until the time the payment is to be made are in this category. . . . [T]he receipt of a day's bonus pay constitutes remuneration for employment which must be included in the regular rate for overtime pay purposes.
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> As explained in section 778.224 of Interpretative Bulletin (IB), 29 CFR Part 778, the "other similar payments" clause of section 7(e)(2) is not intended to permit the exclusion from the regular rate of payments which, though not directly attributable to any particular hours of work, are, nevertheless, clearly understood to be compensation for services rendered.[3]

Courts give administrative agency interpretations in opinion letters respect, but only to the extent the interpretations are persuasive. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042 (8th Cir. 2002). Some factors bearing on the

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[3]The DOL letter goes on to state:
> We wish to point out that section 548.3(e) of 29 CFR Part 548 . . . permits an employer, upon agreement or understanding with the employee, t exclude from the computation of overtime pay certain incidental payments which have a trivial effect on the overtime compensation due. Since one day's bonus pay would be paid every 4 months, it may well be that such payment, even if it were considered part of the regular rate of pay, would not affect the employee's total earnings by more than 50 cents a week . . . .

persuasiveness of an opinion letter include whether it is consistent with the agency's other policies, the degree to which it is factually analogous to the case before the court, and the validity of its reasoning. *Reich v. Delcorp, Inc.*, 3 F.3d 1181, 1186 (8th Cir. 1993) (citation omitted); *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999) (rejecting opinion letter because not factually analogous).

As previously indicated, the facts in the DOL opinion letter are very close to Columbia's buy back plan and the Court has no reason to find that the conclusions reached in the letter are inconsistent with the agency's other policies. The remaining issue then is the validity of the reasoning in the DOL letter.

Columbia disputes Plaintiffs' contention that the buy back program is a bonus. According to Columbia, the purpose of the buy back program is to encourage firefighters to accumulate sick leave because Columbia does not offer short term disability leave to its firefighters. By requiring its employees to maintain a 26 week cushion before qualifying for the buy back plan, the city encourages its employees to accumulate enough time to cover a serious but temporary illness.

The Court understands that this is one purpose of the plan, but it is also clear that the buy back program has two beneficiaries and at least two purposes. While the plan may encourage employees to accumulate sick leave so that they can receive extra pay, it also benefits the employer by encouraging regular attendance. This is because the plan only benefits employees who don't use their sick leave, either because they are healthy and don't abuse their sick leave or they work when they are sick. Until the employee has accumulated

26 weeks of leave, the employee receives nothing new to compensate the employee for his good attendance. He is simply accumulating a benefit to which he is already entitled. It is not until he sells back leave that he acquires something new and it is only these payments that Plaintiffs seek to include in their regular rate of pay.

Before 26 weeks of leave are accumulated, the city of Columbia is the primary beneficiary of the buy back plan because it has received regular attendance, an obvious benefit to the employer. When a firefighter takes sick leave, the employer must pay that employee's salary as well as the salary of a replacement, probably at a higher rate of pay because of overtime. Common sense dictates that employees with reliable attendance habits create value for their employer in the form of lowered compensation and administrative costs, fewer hours spent trying to coordinate scheduling, and better work place morale. The Court, therefore, concludes that Columbia's sick leave buy back program operates as an attendance bonus. In reaching this conclusion, the Court follows Eighth Circuit directive to utilize a "practical, realistic approach" in evaluating FLSA matters. *Henson v. Pulaski County Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1993) (citation omitted).

One question remains. Is the bonus remuneration for services rendered? In *Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995), the Sixth Circuit held that payments for the nonuse of sick leave should not be included in an employee's regular pay rate for purposes of overtime calculations. "These payments are unrelated to the police officers' compensation for services and hours of service. Moreover, awards for nonuse of

sick leave are similar to payments made when no work is performed due to illness . . . ." *Id.* at 905.

In essence, the Sixth Circuit held that the payments were not made in recognition of service, and, therefore, were not remuneration for the employee's services. In *Featsent*, the Sixth Circuit did not mention the DOL letter cited herein, nor does it give an explanation for why it believes that a payment, which operates to encourage regular attendance by employees, is "unrelated to the police officers' compensation for services . . . ."

One clear purpose of the Columbia sick leave buy back plan is to encourage regular attendance, and an employee who attends regularly is more valuable than an employee who takes all the sick time to which he or she is entitled to. Effectively, the buy back program permits the city to retroactively give more money to those employees who have worked steadily because their services were more valuable than the services of an employee who regularly uses his sick leave time. In essence, the payments are for work already done and, therefore, qualify as remuneration.

For similar reasons, the Court also rejects the Sixth Circuit's conclusion that a sick leave buy back program is the same as being paid sick leave when the employee is off work. *See* 29 U.S.C. § 207(e)(2). An attendance bonus is justified by the value of work already performed; the employee is not being paid for being absent, he is rewarded for having been present.

Another exclusion listed in 29 U.S.C. § 207 also suggests that the buy back sick

leave plan should not be excluded from the FLSA definition of remuneration. In 29 U.S.C. § 207(e)(1), the FLSA generally excludes from an employee's regular rate of pay gifts given as a reward for services rendered. Such gifts, however, are included as remuneration if they are "measured by or dependent on . . . efficiency." This suggests that the FLSA requires the inclusion of payments which are made to promote efficiency for the employer. If a gift is included as remuneration because it promotes efficiency, then an employer's agreement to buy back sick leave at 75 cents on the dollar should also be included.

Because the DOL letter is factually analogous and because its conclusion is supported by valid reasoning, the Court finds it persuasive. The Court also believes that, in a close case such as this, a DOL opinion letter is particularly instructive, given the DOL's experience and its overarching understanding of the purpose and operation of the FLSA. In contrast, the Sixth Circuit opinion is conclusory. Moreover, "there is a statutory presumption . . . that remuneration in any form is included in the regular rate calculation. The burden is on the employer to establish that the remuneration in question falls under an exemption." *Madison v. Resources for Human Development, Inc.*, 233 F.3d 175, 187 (3rd Cir. 2000).

The Court, therefore, finds that Columbia's buy back program is a nondiscretionary bonus that should be included in the firefighters' regular wage rate for purposes of calculating overtime pay. Accordingly, the Court grants Plaintiffs' Motion for Summary Judgment with respect to the sick leave buy back program.

C. Columbia's Meal Allowance

As a general rule, expenses that employees incur for their employer's convenience are not included in an employee's regular wage rate, so long as the reimbursement reasonably approximates the expenses incurred. 29 C.F.R. § 778.217(a). Conversely, reimbursement for expenses that are personal to the employee are included in the employee's regular wage rate. *Id.* at (d). Thus, the pivotal issue is whether Columbia's meal allowance for its firefighters is for the benefit of Columbia or an expense that is personal to the firefighters. As previously noted, Columbia's meal allowance program operates as an advance and not a reimbursement in the traditional sense. Although Plaintiffs attempt to hinge their argument on this distinction, it is unpersuasive in light of the Court's obligation to utilize a "practical, realistic approach" in evaluating FLSA matters. *Henson v. Pulaski County Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1993) (citation omitted).

Under 29 C.F.R. § 778.217(a), an employee's expenses are not part of the regular wage rate where the expenses are incurred for the convenience of the employer. *Id.* The regulations provide illustrative examples and one such example is particularly analogous to the issue before the Court. Under section (a)(3), the regulation states that the expenses an employee incurs while the employee is "away from home" are not part of the regular wage rate. 29 C.F.R. § 778.217(a)(3). While section (a)(3) references out of town business travel, the usage of the phrase "away from home" may just as easily apply to Plaintiffs in light of the facts in this case.

Under Columbia's policy, firefighters are not allowed to return home during their

24-hour shift unless there is an emergency. During their 24-hour shift, firefighters are effectively "away from home" even though they may physically remain in the same municipality or county as their home for the duration of their shift. As a result, the expenses they incur as part of this unusual work schedule are inherently for the convenience of Columbia and they are not, as Plaintiffs assert, personal expenses.

An additional requirement in the regulation is that the compensation must be a reasonable approximation of the expenses the employee incurs. 29 C.F.R. § 778.217(c). Although there is no test regarding what is a reasonable meal allowance under the FLSA, the Court concludes that the $12 per day is intended to supplement all the firefighters' meals in a 24-hour period, a supplementation which is needed because the employee cannot prepare meals at home.

The Court recognizes that Columbia's meal allowance does not fit neatly within any of the examples in the regulation, but the regulation explicitly states its list of illustrations is not exhaustive. 29 C.F.R. § 778.217(a)(5). Plaintiff attempts to analogize the meal allowance to a reimbursable expense under section (d) of the regulation. Under section (d), reimbursements for expenses that are for the employee's benefit are included in the employee's regular rate. 29 C.F.R. § 778.217(d). Plaintiffs cite an example from the regulation that states when an employee buys his or her lunch and the employer reimburses him or her, then that reimbursement is included in the employee's regular rate. *Id.* This example, however, is not analogous to the firefighters' meal allowance because the regulation states these are "normal everyday expenses" that are "incurred by the employee .

. . for his benefit or convenience." *Id.* As outlined above, the firefighters' meal allowance is intended to reimburse firefighters for expenses they incur that are for the benefit of Columbia because the restrictive environment of the firehouse is akin to being "away from home." Therefore, Plaintiffs' attempt to analogize to section (d) is unpersuasive.

In their brief, Plaintiffs also focus on the per diem nature of the allowance and that the firefighters do not have to account for how they use the daily stipend. In *Berry v. Excel Group, Inc.*, the Fifth Circuit rejected the plaintiff's argument that his daily per diem allowance should be calculated as part of the regular rate. 288 F.3d 252 (5th Cir. 2002). The court held the plaintiff's per diem should not be included in his regular wage rate because it was for the employer's convenience and it was reasonable under the regulations.

Similarly, this Court finds the per diem nature of Columbia's meal allowance does not negate its status as a payment that is for the convenience of the employer. Technically, the meal allowance is not a reimbursement because firefighters do not have to submit receipts or any other proof of the expenses to obtain the compensation. However, the meal allowance is not paid to firefighters without any relation to the number of hours they work. Under the policy, the firefighters must repay Columbia the $12 per day allowance for any of the 24-hour shifts they do not work during the six months covered by the advance. Therefore, the allowance corresponds to specific shifts Plaintiffs work.

Plaintiffs' meal allowance compensation should not be included in their regular wage rate because the firefighters are "away from home" during their shifts and any meal

expenses they incur during their shifts are for Columbia's convenience.[4]

Accordingly, Plaintiffs' Motion for Summary Judgment regarding Columbia's per diem meal allowance is denied.

D. Willfulness

In their Complaint, Plaintiffs allege Columbia willfully violated the FLSA and they submit a series of factual allegations titled "Notice to Employer" in their pending Motion. Presumably, Plaintiffs were attempting to establish Columbia's FLSA violations were willful. However, Plaintiffs did not submit any arguments in either its initial Motion or its subsequent filings about whether Columbia's violation was willful. Therefore, as the matter is not briefed before the Court, the Court denies Plaintiffs' Motion for Summary Judgment as it relates to the willfulness issue.

IV. Conclusion

Accordingly, it is hereby

ORDERED that Plaintiffs' Motion for Partial Summary Judgment [Doc. # 25] is GRANTED in part and DENIED in part. The Court grants Plaintiffs' Motion for Partial Summary Judgment regarding the sick leave buy back program. The Court denies Plaintiffs' Motion for Partial Summary Judgment regarding the meal allowances and the alleged willfulness of Columbia's conduct.

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[4]Plaintiffs' also assert the meal allowance should be part of their regular wage rate because Columbia taxes it. This is, however, inconsequential under the holding in *Comm'r of Internal Revenue v. Kowalski*, 434 U.S. 77 (1977).

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: September 10, 2004
Jefferson City, Missouri